SUPPORTING BRIEF

OPINIONS

The District Court filed no opinion. Its judgment and sentence is dated March 1, 1945. (The Record erroneously shows March 1, 1946). (R. 12-14). The Opinion of the Circuit Court of Appeals was filed on March 15, 1946 (R. 495-502). It has not been officially reported. The judgment upon said opinion is dated March 15, 1946 (R. 502-503). No petition for rehearing was filed. On March 21, 1946, the judgment of that Court affirming the conviction as to Counts One and Two of the indictment and reversing the same as to Count Three thereof was stayed (R. 503).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (a). Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt.

STATEMENT OF THE CASE

The indictment contains three counts and was returned and filed on October 17, 1944 (R. 1-8). It is alleged in this indictment that on or about March 7, 1944, the petitioner entered into a plan and scheme with George Harris or Ralph Howard, for the purpose of defrauding

the Mudge Oil Company, of Pittsburgh, Pennsylvania, out of the sum of $25,000.00 by the purported sale to it of worthless oil and gas leases, and the use of the mails in furtherance of said plan and scheme, under Criminal Code, Section 215 (18 U. S. C. A., Section 338). The petitioner demurred separately to each count of the indictment. His demurrer was overruled, and he entered a plea of not guilty to each count. He was convicted upon each count, and sentenced for a term of five years, consecutively, or a total of fifteen years. The Circuit Court reversed the conviction as to Count Three and affirmed the conviction as to Counts One and Two.

The petitioner was engaged in the oil and gas business at Blackwell, Oklahoma, when he was charged, and had been for some time prior thereto. He did business both individually and as the American Oil and Gas Company. During March, April and May, 1942, Charles M. Day, of Blackwell, Oklahoma, acquired a block of oil and gas leases commercial upon their face covering 2240 acres of land in Sections 23, 24, 25 and 26, Township 28 North, Range 1 East, Kay County, Oklahoma, near the town of Peckham therein, and hereinafter referred to as the "Peckham Block." A list of these leases appears on page 403 of the Record. Each of these leases is a commercial one, but there was an escrow agreement entered into between the lessor and lessee simultaneously with the execution of the lease and attached thereto, which agreement rendered each lease non-commercial. These leases and the various escrow agreements attached thereto were placed in escrow with

the Security National Bank, Blackwell, Oklahoma, on or about May 21, 1942.

On May 22, 1942, a written contract was made and entered into by and between Day as first party and petitioner as second party by which he acquired said leases and agreed to comply with the terms and provisions thereof, including said escrow agreement (R. 433-436). A duplicate of this agreement was delivered to said bank and became a part of its escrow files with reference to the Day leases. Under this contract petitioner agreed to commence the drilling of a well on some portion of the leased area by July 10, 1942.

In addition to the leases listed on page 403 of the Record three additional leases running to Day, which were assigned by him to petitioner, were placed in said bank on or about January 7, 1943 (R. 438). The escrow file of the bank, being a large envelope kept by L. C. Wright the President of said bank, was identified as Defendant's Exhibit "E," and certain portions of said file were introduced in evidence (R. 78-87).

On or about July 10, 1942, the petitioner commenced drilling operations upon the Sarah Jane Carroll lease covering the Southwest Quarter (SW¼) of Section 24, Township 28 North, Range 1 East, being one of the leases escrowed. After he commenced these drilling operations he endeavored, without success, to induce the bank to deliver him the escrowed leases. Later, however, he secured a number of said leases including th Carroll lease. He sold 640 acres of the escrowed oil and gas leases situ-

ated in and around the Carroll lease to the Mudge Oil Company through Ralph B. Howard as its agent, for $25,000.00 with the agreement to pay Howard back the sum of $15,000.00.

On March 3, 1944, Ralph B. Howard, of Pittsburgh, Pennsylvania, registered at the Larkin Hotel, Blackwell, Oklahoma, Room No. 406. He checked out on Monday, March 6, 1944 (R. 455). The petitioner, as he contends, never knew or heard of Howard until he came to Blackwell on the above date and introduced himself to the petitioner as a representative of the Mudge Oil Company, in the Land Department thereof. Howard examined the leases and agreed to buy 640 acres in and around the Carroll lease on behalf of his Company for $25,000.00 with the understanding that petitioner would pay him back $15,000.00. The deal was closed on this basis on or about March 6, 1944, and on that date Howard delivered to petitioner the Mudge Oil Company check, dated March 4, 1944, for $25,000.00, drawn on the Mellon National Bank, Pittsburgh, Pennsylvania (R. 3). At the time petitioner received said check he as the American Oil and Gas Company delivered to Howard a letter acknowledging the receipt of said check and giving a list of the leases sold aggregating 640 acres (R. 326).

On March 7, 1944, the petitioner endorsed and deposited said check in the First National Bank, Blackwell, Oklahoma, in the name of the American Oil and Gas Company, and received a deposit slip showing such deposit. He gave no directions or instructions as to how the bank

should handle the item, but the petitioner understood the item would go through as a collection one and that the deposit was not subject to check until said check cleared. The Blackwell bank, in due course, by mail, sent said item to the Guaranty Trust Company, New York, for collection, and in due course the check was presented to the Mellon National Bank, and paid. On March 20, 1944, the Blackwell bank drew a draft on the Liberty National Bank of Oklahoma City, Oklahoma, for $25,000.00, payable to the American Oil and Gas Company, and delivered the same to the petitioner (R. 339). On March 21, 1941, the petitioner met Howard in Oklahoma City and delivered to him $15,000.00 of the proceeds of said draft, retaining the balance for himself. The petitioner executed and delivered to Howard an assignment in blank of each of said leases, together with a certificate of title thereto. These assignments were never filed for record. The indictment sets out the respective alleged use of the mails as to each count thereof.

The Mudge Oil Company had two offices, one at Pittsburgh, Pennsylvania, and the other at Dallas, Texas. The Dallas office was the active one, and most of the Company's business was transacted through it. The cancelled checks drawn on the Company's bank account in Pittsburgh were sent to the Dallas office, and early in April, 1944, the Dallas office, in examining the cancelled checks for the month of March, found this $25,000.00 check and observed that it was a forgery. In due course this situation was made known to the Mellon Bank and it

restored the $25,000.00, and as a matter of fact the Mudge Oil Company sustained no loss. On or about April 20, 1944, petitioner learned that it was claimed that said check was a forgery. He did not think so at that time, and believed in good faith when the check was delivered that it was a genuine one. The check, however, was a forgery, but a clever one.

The Peckham leased area was valuable as a wildcat development program and the leases sold to the Mudge Oil Company had a substantial value, in the judgment of petitioner. The 640 acres of oil and gas leases which petitioner thought, as he contends, he sold to the Mudge Oil Company were valuable at the time and had a considerable potential value, in the judgment of the petitioner, and his proof tended to support him in this regard. It was the theory of the respondent that the Peckham leased area was of but little value, and that the leases purportedly sold to the Mudge Oil Company had but little value. The question of the good or bad faith of the petitioner is presented by the record. There was a sharp conflict in the evidence as to the value of the leases purportedly sold. The petitioner made an honest effort, as he contends, to develop the leasd area under the terms and provisions of his contract with Day. He went to Pittsburgh, Pennsylvania, two or three times to secure financial aid in carrying on the development program but without success. He claims he dealt with Howard in good faith, believing that he represented the Mudge Oil Company, and had no knowledge at the time he received the check that the same was a forgery.

SPECIFICATIONS OF ERROR

(1) Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are further instructed that the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act" (R. 315).

and the Circuit Court erred in not so holding.

(2) Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are instructed that the rule of law which throws around a defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime" (R. 313).

and the Circuit Court erred in not so holding.

(3) The District Court erred in overruling the mo-

tion of the petitioner for a directed verdict as to Count Two of the indictment, for the reason that the evidence was wholly insufficient to show the use of the mails as to said Count, and the Circuit Court erred in not so holding (R. 11).

SUMMARY OF THE ARGUMENT

POINT I.

Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are further instructed that the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act" (R. 315).

and the Circuit Court erred in not so holding.

POINT II.

Under the Instructions as a whole the District Court committed prejudicial error in giving the following Instruction:

> "You are instructed that the rule of law which

> throws around a defendant the presumption of innocense and requires the government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime" (R. 313).

and the Circuit Court erred in not so holding.

POINT III.

The District Court erred in overruling the motion of the petitioner for a directed verdict as to Count Two of the indictment, for the reason that the evidence was wholly insufficient to show the use of the mails as to said Count, and the Circuit Court erred in not so holding (R. 11).

ARGUMENT

Point I.

We have heretofore set out this Point and will not repeat it here.

In determining whether or not a given portion of the Instructions is prejudicial, the Instructions as a whole must be considered. The two essential elements of the offenses charged are: (1) The formation and existence of the scheme to defraud the Mudge Oil Company; and

(2) The use of the mails in furtherance thereof. As to the first essential, a criminal intent to defraud must be shown beyond a reasonable doubt and this question is a factual one for the Jury under appropriate Instructions. *Rice* v. *United States* (10th Cir.), 149 Fed. (2d) 601; *Estep* v. *United States* (10th Cir.), 140 Fed. (2d) 40.

Criminal intent being an essential element of the alleged scheme to defraud, the presumption is that the petitioner intended the natural and reasonable consequences of his acts knowingly done. This presumption, however, is a rebuttable one and the burden was upon the respondent to establish his criminal intent beyond a reasonable doubt, notwithstanding such presumption. The District Court, in the use of the following language in the above-challenged Instruction:

> "But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act."

in effect advised the Jury, as a matter of law, that the criminal intent of the petitioner should be determined by his acts and conduct, without regard to his intent, or the lack of it, to defraud, or his good or bad faith, and the giving of such Instruction was fundamental error which was not cured by the other Instructions.

Laws v. *United States* (10th Cir.), 66 Fed. (2d) 870;

Shaddy v. *United States* (8th Cir.), 30 Fed. (2d) 340;

McKnight v. *United States* (6th Cir.), 115 Fed. 972;

Hibbard v. *United States* (7th Cir.), 172 Fed. 66;

Cummins v. *United States* (8th Cir.), 232 Fed. 844;

McCallum v. *United States* (8th Cir.), 247 Fed. 27;

Chaffee v. *United States*, 85 U. S. 516, 21 L. Ed. 908;

Coffin v. *United States*, 116 U. S. 432, 39 L. Ed. 481;

Agnew v. *United States*, 165 U. S. 36, 41 L. Ed. 624.

POINT II.

Considering the Instructions as a whole, the challenged Instruction under this Point lessened and weakened the Instructions theretofore given as to the presumption of innocence and reasonable doubt, and was fundamentally wrong.

Comila v. *United States*, 146 Fed. (2d) 372;

Coffin v. *United States*, *supra*.

POINT III.

The proof of the use of the mails as to Count One of the indictment was sufficient. *United States* v. *Kenofskey*, 243 U. S. 440, 61 L. Ed. 836. The alleged use of the

mails as to Count Two of the indictment is what is termed "Paid Advice" (R. 5-6). This advice was introduced in evidence as Government's Exhibit "8" (R. 50), and appears in the Record at page 337. The only oral testimony as to the use of the mails with reference to this advice is the testimony of W. W. Chambers, Cashier First National Bank, Blackwell, Oklahoma. His testimony in full appears in the Record at pages 48-57. The envelope containing this alleged mailed communication was not presented and no reference is made thereto. There is no proof that this communication was mailed in New York or elsewhere, and the only proof, if any, is the communication itself and the receipt thereof by the Blackwell bank, through the mails. This proof, in our judgment, was wholly insufficient to show the use of the mails as applied to Count Two of the indictment, and the motion of the petitioner for a directed verdict as to this count should have been sustained, and the Circuit Court erred in not so holding.

Brady v. *United States* (8th Cir.), 24 Fed. (2d) 399;

Freeman v. *United States* (3rd Cir.), 20 Fed. (2d) 748;

Davis v. *United States* (3rd Cir.), 63 Fed. (2d) 545;

Whealton v. *United States* (3rd Cir.), 113 Fed. (2d) 710;

United States v. *Baker* (2nd Cir.), 50 Fed. (2d) 122;

Mackett v. *United States* (7th Cir.), 90 Fed. (2d) 462;

Underwood v. *United States* (6th Cir.), 267 Fed. 412;

Rosenberg v. *United States* (10th Cir.), 120 Fed. (2d) 935.

Respectfully submitted,

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